

Entered on Docket

January 16, 2012

GLORIA L. FRANKLIN, CLERK  
U.S. BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

Signed: January 12, 2012


  
 EDWARD B. JELLEN  
 U.S. Bankruptcy Judge
**FILED**

JAN 20 2012

 RICHARD W. WIENING  
 CLERK, U.S. DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA  
 OAKLAND 3/c

 UNITED STATES BANKRUPTCY COURT  
 NORTHERN DISTRICT OF CALIFORNIA

In re

No. 10-41422 EDJ  
Chapter 7

PETER CARSON CLARK,

Debtor. /

TEVIS T. THOMPSON, JR.,  
Trustee

Adv. No. 11-04190 AJ

Plaintiff,

vs.


DAVIS FINE ARTS, ET AL.,

Defendants. /

BANKRUPTCY JUDGE'S RECOMMENDATION TO DISTRICT COURT

Pursuant to the Order Referring Motion for Withdrawal of Reference to Bankruptcy Judge for Recommendation, filed January 5, 2012 in District Court Case no. 11-06256-CW, I recommend that the district court deny the pending motion by the defendants in the above-captioned adversary proceeding for withdrawal of the reference, whereupon I would abstain pursuant to 28 U.S.C. § 1334(c)

Memorandum

 I hereby certify that the foregoing/annexed  
 document is a true and correct copy of the  
 original on file in the Northern District of Calif.  
 Gloria L. Franklin, Clerk  
 U.S. Bankruptcy Court  
 01/17/2012  
 By:   
 Deputy Clerk

1 (discretionary abstention) from hearing the third and fourth claims  
2 for relief of the complaint at issue herein, and possibly the second  
3 claim for relief as well.

4 This approach should not prejudice any party, and will avoid  
5 the need for any court to opine on the Constitutional issue raised  
6 by the defendants in their motion, which remains an open question  
7 upon which definitive appellate guidance is lacking, and which need  
8 not be addressed for the reasons stated below.

9 A. Procedural Background

10 The above debtor, Peter Clark, filed a chapter 13 petition on  
11 February 10, 2010. Subsequently, the bankruptcy court converted the  
12 case to chapter 7. Plaintiff Tevis T. Thompson, Jr. ("Thompson") is  
13 the trustee in bankruptcy.

14 The above captioned adversary proceeding contains four claims  
15 for relief: (a) First claim: Thompson's objection to the group proof  
16 of claim filed jointly by the defendants, (b) Second claim:  
17 Thompson's request for a money judgment against defendant  
18 La Posada pursuant to Cal. Corp. Code § 16701, which Thompson  
19 contends obligates La Posada to purchase the estate's interest in La  
20 Posada; (c) Third claim: for dissolution of two partnerships in  
21 which the estate holds a partnership interest; and (d) Fourth claim:  
22 for dissolution of another partnership in which the estate holds a  
23 partnership interest.

24 Defendants have filed a motion for the district court to  
25 withdraw the reference of this adversary proceeding, or  
26 alternatively, for discretionary abstention pursuant to 28 U.S.C.

Memorandum

1 § 1334(c). Thompson opposes the motion.

2 On January 5, 2012, the district court requested this court to  
3 provide its recommendation as to defendants' motion.

4 B. Discussion

5 As to Thompson's first claim for relief (claim objection), it  
6 does not appear from defendant's moving papers that they have raised  
7 any issue as to a bankruptcy court's Constitutional and statutory  
8 authority to allow and disallow claims against the estate. Indeed,  
9 the Supreme Court has referred to the allowance and disallowance of  
10 claims as an "expressly granted power" of the bankruptcy court<sup>1</sup>.  
11 Katchen v. Landy, 382 U.S. 323, 329 (1966). It follows that, at  
12 least on the record to date, there is no reason for the district  
13 court to withdraw the reference of Thompson's first claim for  
14 relief.

15 The defendants have not specifically objected to the bankruptcy  
16 court hearing the second claim for relief. Even so, to the extent  
17 Thompson seeks a money judgment on substantive grounds governed by  
18 California state law, the defendants may have a Seventh Amendment  
19 right to a trial by jury. If so, abstention by the bankruptcy court  
20 would be appropriate as to this claim, because bankruptcy judges may  
21 not conduct jury trials absent consent of the parties. 28 U.S.C.  
22 § 157(e). Moreover, this may not even be a core claim, in which  
23 case the bankruptcy court could not enter any binding findings  
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25 <sup>1</sup>Note that Katchen addressed the power of a bankruptcy  
26 referee acting under the Bankruptcy Acts of 1898 and 1938,  
analogous to a contemporary bankruptcy court.

1 absent consent of all the parties. 28 U.S.C. § 157(c)(2).

2 For the foregoing reasons, abstention may be appropriate as to  
3 the second claim for relief. But even if it is, it does not follow  
4 that the reference needs to be withdrawn; a bankruptcy court may  
5 abstain on its own authority.

6 Defendants' motion focuses on Thompson's third and fourth  
7 claims for relief, by which Thompson seeks to dissolve various  
8 partnerships in which the estate holds an interest. These are  
9 matters governed by California law. Defendants contend that the  
10 bankruptcy court may not Constitutionally hear the claims under the  
11 Supreme Court's recent ruling in Stern v. Marshall, a proposition  
12 that Thompson disputes. See Stern v. Marshall, 564 U.S. \_\_\_, 131  
13 S.Ct. 2594 (2011) (holding that the bankruptcy court lacked  
14 Constitutional authority to enter a final judgment on debtor's state  
15 law counter-claim).

16 It is not necessary for the court to reach the Stern issue.  
17 Under existing and well established Ninth Circuit law, bankruptcy  
18 courts are to construe matters as non-core when the core or non-core  
19 nature of a proceeding is a close call and raises a constitutional  
20 issue. See In re Castlerock Properties, 781 F.2d 159, 162 (9th Cir.  
21 1986) ("[A] court should avoid characterizing a proceeding as 'core'  
22 if to do so would raise constitutional problems."). That is the  
23 case here.

24 In my view, under Castlerock, a proceeding to dissolve a  
25 partnership in which the estate has an interest is not necessarily a  
26 core proceeding under 28 U.S.C. § 157(b)(2). "The apparent broad

1 reading that can be given to § 157(b)(2) should be tempered...."  
 2 Castlerock at 162. If Thompson's third and fourth claims for relief  
 3 are not core proceedings, then the bankruptcy court may not enter  
 4 binding findings absent consent of all the parties, lacking here.  
 5 28 U.S.C. § 157(c)(2).

6 Even if the claims are core, this is still an appropriate case  
 7 for discretionary abstention under the factors discussed by the  
 8 Ninth Circuit in In re Tucson Estates, Inc., 912 F.2d 1162, 1167  
 9 (9th Cir. 1990)<sup>2</sup>. The dissolution of the partnerships is governed  
 10 by California law. Dissolving them in a California court will not  
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12 <sup>2</sup>In Tucson Estates, the Ninth Circuit adopted a list of  
 13 factors that a bankruptcy court should consider when deciding  
 14 whether to abstain, as propounded by the Texas bankruptcy court  
 15 in In re Republic Reader's Serv., Inc., 81 B.R. 422 (Bankr. S.D.  
 16 Tex. 1987). Those factors are: (1) the effect or lack thereof on  
 17 the efficient administration of the estate if a Court recommends  
 18 abstention, (2) the extent to which state law issues predominate  
 19 over bankruptcy issues, (3) the difficulty or unsettled nature of  
 20 the applicable law, (4) the presence of a related proceeding  
 21 commenced in state court or other non-bankruptcy court, (5) the  
 22 jurisdictional basis, if any, other than 28 U.S.C. § 1334, (6)  
 23 the degree of relatedness or remoteness of the proceeding to the  
 24 main bankruptcy case, (7) the substance rather than form of an  
 25 asserted "core" proceeding, (8) the feasibility of severing state  
 26 law claims from core bankruptcy matters to allow judgments to be  
 entered in state court with enforcement left to the bankruptcy  
 court, (9) the burden on the bankruptcy court's docket, (10) the  
 likelihood that the commencement of the proceeding in bankruptcy  
 court involves forum shopping by one of the parties, (11) the  
 existence of a right to a jury trial, and (12) the presence in  
 the proceeding of non-debtor parties. In re Republic Reader at  
 429.

1 interfere with the administration of the debtor's estate. The  
2 rights of nondebtor parties may be impacted. There is no basis for  
3 bankruptcy court jurisdiction other than 28 U.S.C. § 1334.

4 C. Conclusion

5 For the foregoing reasons, I recommend that the district court  
6 not withdraw the reference.

7 \*\*\* END OF RECOMMENDATION \*\*\*  
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UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA  
1300 Clay Street (2d fl.)  
Oakland, CA 94612

Memorandum

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Memorandum